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In the Supreme Court of the United States

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OCTOBER TERM, 1968

No. 941

JOHN A. CROSS, et al., *Petitioners,*
vs.
S. S. KAIMANA, her engines, etc., et al., *Respondents.*

JOHN A. CROSS, et al., *Petitioners,*
vs.
S. S. LANAKILA, her engines, etc., et al., *Respondents.*

JOHN A. CROSS, et al., *Petitioners,*
vs.
S. S. ALASKA BEAR, her engines, etc., et al., *Respondents.*

JOHN A. CROSS, et al., *Petitioners,*
vs.
S. S. PACIFIC BEAR, her engines, etc., et al., *Respondents.*

JOHN A. CROSS, et al., *Petitioners,*
vs.
S. S. COAST PROGRESS, her engines, etc., et al., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RICHARD ERNST
635 Sacramento Street
P. O. Box 7861, Rincon Annex
San Francisco 94119

JOHN PAUL JENNINGS
345 World Trade Center
San Francisco 94111

Attorneys for Petitioners

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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S. S. COAST PROGRESS, her engines, etc., et al.,	*Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, trustees of fifteen trusts whose beneficiaries are seamen, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, printed at p. 12 of the appendix hereto, which was entered in the five cases of John A. Cross, et al. v. S.S. KAIMANA, her engines, etc., et al. (Cases No. 21719, A-D), on October 16, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals, printed at p. 1 of the appendix hereto, is not yet reported. The opinion of the United States District Court for the Northern District of California (C.T. 531-544), printed at pp. 2-12 of the appendix hereto, is reported at 265 F. Supp. 723.

JURISDICTION

The judgment of the Court of Appeals, appendix hereto p. 12, was entered on October 16, 1968. The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

These cases involve Art. III, Sect. 2, of the United States Constitution, which is printed at p. 13 of the appendix.

The petition relates to admiralty cases involving substantive law that is entirely judge-made. Accordingly, no statutes are directly involved. Although the lower courts discussed the Ship Mortgage Act at some length, they correctly concluded that all lien claims for wages of the crew of the vessel have "priority over ship mortgages" (See App. 6). In the course of the litigation some references have been made to statutes, the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§ 141, et seq.; the Ship Mortgage Act of 1920, as amended, 46 U.S.C. §§ 911-984; the Internal Revenue Code of 1954, as amended, 26 U.S.C.; and the Bankruptcy Act, 11 U.S.C. The portions that might be pertinent are printed in the appendix hereto.

QUESTIONS PRESENTED

1. Is the maritime lien for the wages of the crew member of a vessel security for his vacation pay, retirement pay and welfare coverage?

2. Is this maritime lien for wages lost to the extent that the crew member's contract provides that these parts of his wages are to be paid to him through multi-employe - multi-employer trusts established as conduits for his vacation pay, his retirement pay, and his welfare coverage?

3. May such trusts that advance this deferred compensation to the crew member enforce this security to recover the wages they have so advanced?

STATEMENT OF THE CASE

Each of the crew members of each of the five vessels here involved had a contract with the vessel operator calling for payment of a certain wage consideration for his maritime services on the vessel. Here at issue are three portions of each crew member's agreed wage package: deferred compensation in the forms of vacation pay, retirement pay and welfare coverage. Each crew member performed his maritime services on the vessel, and the agreed wage consideration therefor became the wage obligation of the vessel operator. By this same performance of these services, and by no further act or any formality, the lien for wages of the crew member attached against the vessel as security for performance of her operator's wage obligation. The vessel operator's duty to pay these wages has never been performed. The vessel operator is in default in its wage obligation. The courts below held that the wage lien did not secure payment of this obligation.

Federal jurisdiction exists because this is a case "of admiralty and maritime jurisdiction". United States Constitution, Art. III, Sect. 2. The district court also referred to 28 U.S.C. § 1331(1) and 46 U.S.C. §§ 951, 953.

The material detailed facts.

Each individual employment contract of the crew members called for payment of a wage package of many parts. The package reflects choices made by the crew members and their fellow seamen acting through their maritime unions. The details of this wage consideration were specified in the applicable collective bargaining agreement, which also required that the individual contracts include the wages there specified. As is usual among workers today, the seamen chose to take substantial parts of their wage

package in daily accruals of these three forms of deferred compensation rights. The value of each daily accrual of each of the three forms of compensation for each crew member was actuarially determined. The crew member's individual contract provided that his vacation pay, his retirement pay and his welfare coverage would be collected through a multi-employe - multi-employer trust set up by the seamen for this purpose in the usual way common in American industry. These contracts each imposed a duty on the vessel operator to the seaman to pay to the proper trust this computed value of each of the three items of deferred compensation earned by each day's performance of maritime services.

Each of the particular seamen involved in these cases has actually collected the deferred compensation he has earned. The trusts advanced credit to each crew member for the daily accruals of the vacation pay, retirement pay or welfare coverage with which it is concerned. Subsequently, the trust advanced the proceeds of these credits as called upon to do so. The crew member collected his vacation pay. He has his retirement pay. He has had his welfare coverage for himself and his family. Each of the trusts that advanced these deferred wages to the crew members has proceeded in rem in the admiralty court to enforce the lien securing the vessel operator's wage obligation that remains unpaid.

The decisions below, were they to stand, would deny the lien for wages as security for the portions of seamen's wages that they, through their unions, allocate to deferred compensation. These decisions permit one who provided a vessel to a vessel operator (either as charterer, seller on a purchase money mortgage, mortgage lender or insurer of these loans) to recover the vessel, or its proceeds, free of payment of a substantial wage cost incurred while the vessel was left in the hands of the vessel operator. Here, although a wage obligation was not met and the proper admiralty proceeding in rem was timely instituted against the vessel to re-

quire performance of this obligation, the lower courts have permitted the vessel to evade the lien securing its payment.[1]

REASONS FOR GRANTING THE WRIT

This limitation on the scope of the lien for seamen's wages raises an issue of major significance that has not been, but should be, settled by this Court. The substantive issue is one purely of judge-made admiralty law. In limiting the lien, the lower courts have

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1. In the proceedings below the efforts to enforce the lien were resisted by Pacific Far East Line and the United States. They represented the interests in the vessel of her charterer to the defaulting vessel operator, of her seller to the vessel operator on a purchase money mortgage, of the mortgage lenders to the vessel operator, and of the insurer of such loans. Both had detailed rights to be privy to the financial affairs of the operators of vessels in which they had interests and to police the conduct of the operator's business. Pacific Far East Line has a variety of interests in the litigation. Its principal officer at the time involved, T. E. Cuffe, was a trustee of a number of the plans that advanced wages to the seamen whose employer had defaulted, and he signed plan documents specifically stating that the lien for wages was applicable. It was one of the employer members of the Association executing the collective bargaining agreements here involved and was a participant in all of the deferred compensation plans and related trusts here involved. It chartered one of the vessels to one of the defaulting vessel operators. It is a regular berth-line operator, having construction and operating subsidy contracts with the United States. It sold three of the vessels to the defaulting companies as part of its program of vessel replacement under its construction subsidy contracts. The United States is likewise involved in the issues in a variety of ways. It has been directly involved in the difficult problems of collective bargaining between maritime unions and the employers. It further has acted consistently as a protector of seamen. It previously owned at least one of the vessels and it transferred, or agreed to the transfer of, one vessel to one of the defaulting companies under a purchase money mortgage. It also was involved as an insurer of ship mortgages. Further, it provides subsidy to regular berth-line operators of American flag vessels, thereby paying approximately 80% of the cost of wages to seamen on subsidized runs. Accordingly, it obtains copies of the collective bargaining agreements and the deferred compensation plans. Subsidy is specifically payable on the cost of all of the deferred compensation here involved; the United States has asserted that these costs are now excessive. It also provides construction subsidies to encourage the berth-line operators to put new modern vessels into operation and to transfer older vessels, such as those here involved, to American flag operators in other services. It also has a direct interest in encouraging the maintenance of American flag merchant marine in view of its significance to the national defense. Finally, it is the largest buyer of cargo transportation.

made policy judgments that impose a duty of policing the financial affairs of their employers on seamen and their unions. It is imperative that seamen and their unions know whether they can give credit to vessel operators, in reliance on the lien for seamen's wages, or must develop a new mechanism for assuring that all wages of seamen are paid. It is also imperative that others in the industry know the scope of the risks they run if they permit others to operate vessels in which they have ownership or security rights.

Trusts, like those here involved, are used in industry generally and throughout the maritime industry for deferred compensation. They are particularly desirable in the maritime industry where a seaman works for many different employers on many different ships over the period of his working life. Without the modern multi-employe - multi-employer trusts many seamen would be denied vacation pay, retirement pay and welfare coverage. If the money were payable directly to the seaman he could, of course, libel the vessel. These trusts should also be able to enforce his lien acting for the seaman and for his benefit as the agency designated by the seaman to collect his deferred compensation as earned and to pay it to him later. In this case, this Court can declare that the admiralty courts continue to have the power and obligation to meet new developments in wages so as to protect the seaman and foster the maritime industry.

The seamen throughout the United States have chosen to allocate a substantial portion of their wage package to deferred compensation. For a number of reasons, they have also decided to use the typical multi-employe - multi-employer trusts to collect their wages taken in the form of vacation pay, retirement pay, and welfare coverage. First, such trusts are of particular importanc to seamen because the places where they work operate 365 days a year and throughout the world; hence a seaman normally has a considerable number of employers over the period of time in which he earns his deferred compensation. The use of these trusts

thus permits the accumulation of deferred compensation from several employers, or "portability" of vacation, pensions and welfare among all of the employers. Second, these trusts are encouraged by labor relations law, being the subject of the special exception in the Taft Hartley Act, Labor Management Relations Act of 1947, §302(c), 29 U.S.C. §186(c). Third, use of these trusts is also encouraged by statutory provision that gives the seaman advantages permitting him to get the greatest economic benefit out of the portion of his wages allocated to deferred compensation. Use of these trusts permits the crew member to have his wages allocated to pensions invested and earning interest without payment of tax until he actually collects the deferred compensation itself, and to have his wages allocated to welfare coverage so administered free of tax and also to collect it without payment of any tax thereon.

The wage obligation to the seaman for his deferred compensation is going to be met in one way or another. The seaman performs his maritime services in consideration of the performance of the full wage obligation by the vessel operator. He cannot be expected to perform these services in the future if the wage obligation for his vacation pay, retirement pay and welfare coverage can be left in default. He cannot be expected to give up the advantages inherent in the use of the trusts. The strong and vigorous unions in the maritime industry will use their economic power to see that these wage obligations are met.

The historical security for the crew's wages provides a ready and effective means of assuring that the seaman's choice in allocating his wages will not impair his getting the wages he earns. A vessel, under admiralty law, is liable "to its last plank" for the wages of her crew. Only after the crew has been paid its wages can value be obtained out of the vessel by any other person, whether the ship's owner, a lender on its security, any other type of creditor of the operator, or any holder of a lien against the vessel or against its owner.

The crew is secured against all others and without regard to the profitability of the voyage. All others who are involved in the economic enterprise of the vessel's operation are entrepreneurs vis-a-vis the crew members. The law relieves the crew member of the risk that the vessel operator will have insufficient funds to pay wages; it places the burden on the vessel owner if she is out on charter, on her previous owner who has taken a purchase money mortgage, on any lenders on the security of the vessel, and on all other persons doing business with the vessel. Those who advance money to provide vessels to vessel operators know they have secondary rights. They can insist on means to police the financial affairs of their debtor. They are able to take the necessary steps to protect their junior liens against the possibility that the vessel's operator will fail.

For generations, seamen have relied on the lien to protect every bit of their compensation for maritime services, being denied its security only where the compensation is not subject to measurement. The lien has supported the social principle that the seaman shall not lose any portion of his wages, even though he works on a vessel that has no earnings from her freight or that is lost or so damaged as to become valueless. Effectuating this principle means, in turn, that seamen shall not become a burden upon society because of their employer's sharp practices or financial reverses.[2]

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2. The district court's opinion (App. 2-12) discusses many of the relevant American cases. These establish, it correctly rules, that the lien for the crew's wages covers "compensation for maritime services regardless of the form of the compensation provided only that the claim is reducible to money" (App. 5), that all claims secured by the "traditionally broad" lien for wages have "priority over ship mortgages" (App. 6) and that petitioner trusts have the right to enforce the lien (App. 9). These cases are not referred to further in this petition. The courts below did not refer to *The Madonna d'Idra,* 1 Dods. Adm. 37, 175 Eng. Rep. 1224 (High Court of Admiralty, 1811), which is printed in the appendix hereto as in the appendix to our Court of Appeals brief and was discussed in detail by Mr. Justice Story in *Harden* v. *Gordon,* 11 Fed. Cas. 480 at 482 (No. 6047) (C.C.D. Me. 1823).

The lien for wages is necessary to the success of the maritime enterprise. This assurance of security - recognized worldwide - has made it possible to meet the need of getting seamen to join a vessel wherever they are needed and to sail her wherever the master directs. The seaman and his union need neither investigate the financial condition of the vessel operator when he joins the crew nor police its financial affairs while he performs maritime services. Knowing that he can rely upon the security of the wage lien to protect him in case there is a default, the seaman receives most of his wages at the end of the voyage. This in turn makes it feasible to carry on vessel operations with the operator not having to come up with the cash for these wages until the voyage has been completed, the freight has been earned, and the accounts are prepared.

The protection of the lien thus enables both the seaman and the vessel operator to accept the uniform practice of payment of wages at the end of the voyage. This practice, dependent upon the orderly means for collecting wages in case of default, should also apply to the deferred compensation that the seaman has due him. The alternatives open to the seamen and their unions are: (1) To enforce the lien for wages and place the cost on those who leave vessels in which they have interests in the hands of financially insecure vessel operators, (2) To carry on strike and work stoppage activity to make a vessel valueless to the operators and creditors if her wage obligations are not met, and (3) To require full payment of the deferred compensation wage obligation before the voyage begins. The latter two alternatives, to the orderly process of enforcing the lien, will disrupt the maritime industry.

So that the seamen could share in the now common employe rights to vacation pay, retirement pay and welfare coverage, the simple legal relationship between the vessel operator and the seaman - under which the vessel operator had an obligation to pay wages and the seaman had a right that the wages be paid -

was supplemented by an involved superstructure of legal relationships. The ship operator was called upon to agree with each seaman, and did so agree, to pay the wage dollars that the seaman had allocated to deferred compensation to the trusts rather than to the crew member. These wages were called "contributions" in accordance with the nomenclature in the Internal Revenue Code and Regulations. The trust acted for the seaman to collect his wage dollars, to hold them, to invest them, to collect and accumulate income free of tax, to administer them, and to pay the deferred compensation when claimed. The seaman had, in addition to his contract right that the vessel operator make the wage payment to the trust, as directed by him, his right to the portion of the wages he earned that he had directed be turned over to the trust. These rights of the seamen were set out in the agreed terms in the collective bargaining agreement between their union and their many employers. These collective agreements obligated the employers and the seamen to include these specific terms in the individual contracts of employment of the type mentioned above. Thus a superstructure of contractual rights was created including:

(1) All of the seamen agreed that each would take part of his wages in each of the three forms of deferred compensation, that each would collect it through the appropriate trust, and that each would enter into the described form of individual contract with the vessel operator to carry out this agreement.

(2) All of the employers agreed that each would participate in the respective trusts, would enter into the prescribed form of individual contracts with individual crew members, and would pay the wages earned as required thereby.

(3) Each of the trusts agreed to collect the allocated part of the wage package and to administer the money and to distribute it in accordance with the agreed-upon plan.

The courts below looked only to this superstructure, the formal mechanism chosen by the seamen as the means of collecting their deferred compensation.

The trusts here seek to enforce the wage obligation of the vessel operator under its contract of employment with the crew member. This wage obligation arose from the performance of maritime service in accordance with the individual contract between the vessel operator and the man. This contract gave the seaman the right to have this wage obligation fulfilled. The performance of maritime services created a lien to secure performance of this obligation. The trust, being the seaman's agency to collect and hold and disburse his deferred compensation and having advanced these wages to him, is entitled to enforce the lien. The wage obligation remains unsatisfied. The full wage obligation, including payment of the agreed wages allocated to vacation pay, retirement pay and welfare coverage, must be satisfied before the vessel's owner and charterer - and likewise its seller under a purchase money mortgage, the lender on its [redacted], and the insurer of such loans - have any right to the vessel or its proceeds.

The bankruptcy statute was erroneously used as the basis for developing a new judge-made rule of admiralty law.

The courts below have misinterpreted the holdings of this Court[3] regarding the phrase "wages . . . due to workmen" in Sec. 64(a)(2) of the Bankruptcy Act, 11 U.S.C. §104(a)(2). These cases have to do with priorities as among unsecured creditors. These holdings do not permit deferred compensation trusts to have the benefit of the priority for up to $600 of the wages "due to workmen" earned in the three months before the bankruptcy proceeding is begun. These opinions, of course, have nothing to do with the liens that have developed in the admiralty law to give security for payment of all of the wages earned by seamen, irrespective of amount or time involved. In fact, these opinions have nothing to do with the rights of secured creditors at all.

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3. *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959); *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224 (1968). See App. pp. 10-12.

Deferred compensation has become a major portion of the seaman's wages. Substantial sums that might have been taken by the seaman in cash have been allocated to vacation pay, retirement pay, and welfare coverage. Earnings have been transferred from cash wages to deferred wages. The admiralty law giving wages the first lien against the vessel, rather than an excerpt from a Supreme Court opinion interpreting the bankruptcy statute, should determine whether the petitioners are able to enforce the lien they claim. This important proposition of federal law should be determined by this Court at this time.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue from this honorable Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Cross, et al v. S.S. Kaimana, et al.,* and the four related cases. In the event that the petition is granted, petitioners pray that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to enter an order that the portions of the crew members' wages allocated to deferred compensation shall be paid over to the trusts, with interest, before any other claimant shall have any rights to the vessel or the proceeds thereof.

Respectfully submitted,

RICHARD ERNST
JOHN PAUL JENNINGS

(Appendices Follow)

United States Court of Appeals
for the Ninth Circuit

JOHN A. CROSS, et al., *Appellants,* vs. S. S. KAIMANA, her engines, etc., et al., *Appellees.*	No. 21,719
JOHN A. CROSS, et al., *Appellants,* vs. S. S. LANAKILA, her engines, etc., et al., *Appellees.*	No. 21,719-A
JOHN A. CROSS, et al., *Appellants,* vs. S. S. ALASKA BEAR, her engines, etc., et al., *Appellees.*	No. 21,719-B
JOHN A. CROSS, et al., *Appellants,* vs. S. S. PACIFIC BEAR, her engines, etc., et al., *Appellees.*	No. 21,719-C
JOHN A. CROSS, et al., *Appellants,* vs. S. S. COAST PROGRESS, her engines, etc., et al., *Appellees.*	No. 21,719-D

[October 16, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: Pope, Hamley and Merrill, Circuit Judges Per Curiam:

The judgments in the above-entitled causes, consolidated for trial and appeal, are affirmed for the reasons stated in the opinion of the district court reported *sub-nom. Long Island Tankers Corporation, et al. v. S.S. Kaimana, et al.*, 265 F.Supp. 723.

United States District Court
Northern District of California

Consolidated for trial with 28026, 28094, 28107, 28223

Long Island Tankers Corporation, a corporation, *Libelant,* and John A. Cross, et al., *Libelants in Intervention,* vs. S.S. Kaimana, her engines, etc., et al., *Respondents.*	No. 28019 (Admiralty)

MEMORANDUM OF DECISION

SWEIGERT, J.

This is a consolidation of five separate libels *in rem* involving claims by the trustees of certain so-called vacation, pension and welfare trusts against each of five vessels—SS Lanikai, SS Alaska Bear (now owned by Pacific Far East Line, Inc.), SS Kaimana, SS Lanakila (upon which Pacific Far East Line, Inc., is holder of preferred ship mortgages) and SS Coast Progress (upon which the United States is holder of a preferred ship mortgage).

The Court has jurisdiction of the parties and subject matter under U.S. Const. art. III, § 2; 28 U.S.C. § 1331(1); and 46 U.S.C. §§ 951, 953.

The cases are presently before the Court for decision after trial upon a "Stipulation as to Certain Facts and Other Matters" and certain testimony and exhibits introduced at trial. The evidence introduced at trial was largely explanatory of the provisions of the collective bargaining agreements governing the trusts.

Under the provisions of these collective bargaining agreements between Pacific Maritime Association, representing steamship

companies and various maritime unions, representing sea-going personnel, certain vacation, pension and welfare trusts were established and placed under the administration of trustees equally divided between persons designated by Pacific Maritime Association and persons designated by the unions.

The collective bargaining agreements provide for the payment of vacation pay, pensions and welfare benefits by the trustees to designated beneficiaries. These beneficiaries include not only the various sea-going personnel but also shore-based union officials, instructors at schools for seamen, shore-based workmen repairing and maintaining cargo vans and personnel administering the trusts herein.

The collective bargaining agreements also provide the method of financing such benefits. Under the agreements the steamship companies are obligated to make contributions to the trustees of the various trusts through the Pacific Maritime Association. These contributions are based upon the number of days of work performed for each steamship company by covered employees and the job classification of the particular employee.

The libels *in rem* here involved are based upon claims by the trustees against Coastwise Line and Dorama, Inc., both steamship companies bound by the collective bargaining agreement, for contributions due and owing to the trustees as a result of the operation by Coastwise Line of each of the five vessels herein and the operation by Dorama, Inc., of three of them. During these operations work was performed for these steamship companies by sea-going personnel covered by the collective bargaining agreement.

Coastwise, however, failed to pay its contributions for voyages which terminated during the period of February 1959 through February 23, 1960, and is now insolvent.

Dorama failed to pay its contributions for voyages terminating during the period of June 23, 1959, through February 25, 1960, and is now insolvent.

The basic issue involved in all five proceedings is whether the trustee's claims for the contributions which became due and owing from Coastwise Line and from Dorama, Inc., can be asserted as maritime liens and, if so, whether they are entitled to "preferred" maritime lien priority against said vessels as "wages of the crew of the vessel" within the meaning of 46 U.S.C. § 953.

Section 953 of Title 46 is part of Chapter 25 of Title 46 dealing with ship mortgages and known as the Ship Mortgage Act, 41 Stat. 1000-06 (1920), 46 U.S.C. §§ 911-84 (1964).

Prior to 1920 ship mortgages were not entitled to enforcement by maritime liens and were subordinate to all of the many maritime liens a ship might incur. See *Bogart v. The John Jay,* 58 U.S. 399 (1854). For this reason they came to be "practically worthless" as security instruments. See *Detroit Trust Co. v. The Barlum,* 293 U.S. 21, 39 (1934). The Congress, in order to provide for the promotion and maintenance of the American merchant marine, enacted this Ship Mortgage Act to make private investment and credit in the shipping industry more attractive and also to protect the United States as one of the principal sources of credit for ship financing. See Gilmore and Black, THE LAW OF ADMIRALTY 571 (1957). This was accomplished by placing ship mortgages upon a stronger security basis.

The Ship Mortgage Act provides that mortgages which comply with the conditions enumerated in 46 U.S.C. § 922 shall be called "preferred mortgages" and as such entitled to the preferred status given by 46 U.S.C. § 953. See 46 U.S.C. § 922(a), (b).

Section 953 of the Act provides that in any foreclosure and sale of a ship in admiralty, all preexisting lien claims in the vessel shall be held terminated and shall thereafter attach to the proceeds of the sale except that a "preferred mortgage lien" shall have priority over all such claims *except* "preferred maritime liens" and expenses, fees and costs allowed by the Court.

Section 953(a) provides that the term "preferred maritime lien," as used in the chapter, means (1) a lien arising prior in time

to the recording of a preferred mortgage or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband or agent of the vessel, "for wages of the crew of the vessel" for general average and for salvage. The Ship Mortgage Act does not further define the term "wages of the crew of the vessel."

A threshold question is whether Congress intended by the phrase "wages of the crew of the vessel" as used in Section 953, to include all seamen's lien claims for compensation for maritime service or intended only a more limited kind of seamen's maritime lien claim. The trustees contend that Congress intended to protect the traditional seaman's wage lien claims and did so by providing that "wages of the crew of the vessel" have priority over preferred ship mortgages.

Admiralty courts have not limited the seaman's lien claim to those for ordinary wages. On the contrary, the Courts have recognized the seaman's lien claim for compensation for maritime services regardless of the form of the compensation provided only that the claim is reducible to money. See *Harden v. Gordon,* 11 Fed. Cas. 480 (No. 6047) (C.C.Me. 1823). From the earliest period of maritime commerce the test in admiralty courts for determining whether there is a seaman's wage lien has been: Has a maritime service been performed? If such service has been performed, then whatever constitutes the compensation for the service, if reducible to money, may be enforced by a maritime lien against the vessel upon which those services were performed.

In *Gayner v. The New Orleans,* 54 F.Supp. 25 (N.D. Cal. 1944) the Court (Goodman, J.) allowed seamen's wage liens for dismissal cash benefits due ferry-boat employees under their collective bargaining agreements as a result of the abandonment of ferry-boat service in San Francisco Bay. The Court rejected the contention of the respondent that the ferry-boat company and not the vessel was responsible for the payment of such benefits under

the collective bargaining contract and that the benefits were not in their nature such wages or compensation as entitled a seaman to a maritime lien stating at 27: ". . . that the fullest protection to seamen for *all maritime services* has always been the policy of the Admiralty."

In *The Great Canton,* 299 F. 953 (E.D.N.Y. 1924) the Court rejected a contention that the seaman's entitlement to one month's wages for improper discharge under 46 U.S.C. § 594 and for two days' pay for each and every day wages are withheld after a specified period under 46 U.S.C. § 596 is against the master or owner and not a lien against the vessel. Going back to the early case of *Sheppard v. Taylor,* 5 Pet. 674, 709-10 (1931), wherein Justice Story wrote of the remedies of seamen against the vessel, the Court upheld the seamen's maritime lien for this statutory compensation. See also *The Osceola,* 189 U.S. 158 (1903) (seaman's wage lien upheld for maintenance and cure resulting from a seaman falling sick in the service of the ship) and *The Leonidas,* 116 F.2d 440 (4th Cir. 1940) (seaman's wage lien upheld for extra compensation for hazardous maritime service in a war zone).

For purposes of decision in this case, but without deciding the question, the Court will assume that the phrase "wages of the crew of the vessel", as used in § 953, was intended to include the traditionally broad seaman's lien claim and to give all such lien claims priority over ship mortgages.

The remaining and basic question is whether the claim for the contributions here involved constitutes seamen's claims for compensation for maritime services in the broad traditional sense.

In each of the cases above mentioned, the compensation in question had become due to the seamen and the only question was whether the form of the compensation was such as to bring the claim within the protection of the seaman's maritime lien.

In the pending case the contributions in question are due and payable, not to the seamen, but to the trustees. The collective bar-

gaining agreement expressly states that the contributions from the steamship companies are payable only to the trustees, not the employees, and that covered employees have no right, title, interest or claim in or to their employer's or any other employer's contributions to the trust funds.

The contributions in question are not for pension, vacation or welfare benefits due to any particular seaman because such benefits are necessarily computed on a different basis than the contributions from the steamship companies.

Under the collective bargaining agreement benefits to a particular seaman are computed according to the number of days of his covered employment over a specified period provided a minimum number of days are worked by the particular employee during the period. In the computation all days worked by the seaman for any of the steamship companies covered by the agreements are included and totaled.

The amount of the benefit, thus computed, to which a particular covered employee may become entitled bears no direct relationship to the amount of contributions to the trustees from any particular steamship company.

On the other hand, the contributions of the steamship companies, including, of course, Coastwise Line and Dorama, Inc., are computed according to the number of days of covered employment worked by covered employees for the particular steamship-company and the job classification of those employees.

Further, although contributions for union officials are made by the unions and contributions for trust personnel by the trust, itself, steamship company contributions are made for work performed, not by seamen, but by seamen school instructors and shore based workmen maintaining cargo and vans.

Further, the agreements provide for annual review of the operations of the trust fund plans and for an increase in the rate of steamship company contributions whenever necessary to assure that the trusts will be sufficient to meet all benefits to which cov-

ered employees may be entitled. These trust funds are also financed in part by income on investment of trust funds.

In the pending case the claims of the trustees are not for any pension, vacation or welfare benefits due to any particular seaman. No seaman claims non-payment of any such benefit. It appears from the Stipulation of Facts that all seamen who performed maritime service for Coastwise and Dorama have received and will continue to receive from the trustees all such benefits to which they were or may become entitled notwithstanding the failure of Coastwise and Dorama to make the contributions based upon the maritime services of those seamen.

On the other hand, no benefits are paid to seamen who do not work the required minimum number of days during the specified period even though the steamship employer makes its contributions for the days worked by them.

It appears, therefore, that the claims of the trustees are solely for contributions due from Coastwise and Dorama to the trusts. Those contributions are a means of financing the trust funds but they do not constitute the compensation to which any particular seaman is or may become entitled.

In our opinion, therefore, the claims of the trustees for the contributions in question do not constitute claims enforceable as seamen's maritime liens in the statutory or traditional maritime sense.

This conclusion does not foreclose the right of seamen to enforce their claims for pension, vacation or welfare benefits by maritime lien. We are not called upon to determine in this case whether sea-going personnel, entitled to vacation, pension or welfare benefits under the collective bargaining agreement, have a right to enforce such claim in the event of non-payment from the trust by means of a maritime lien, either in the traditional sense or in some narrower statutory sense, upon the ship or ships of any particular stamship company for whom they rendered maritime

services or upon the ships of all steamship companies' parties to the agreement.

Such claims of seamen for unpaid pension, vacation or welfare benefits stand on an altogether different footing than the contributions from the steamship companies.

The seamen's claims for unpaid benefits are clearly for the protection of the seaman but claims of the trustees for contributions from certain steamship companies are more for the protection of the other steamship companies against increase of their rate of compensation by reason of default of one or some of them.

As far as the seamen are concerned, even the default of all the steamship companies would not deprive the seamen of their claims of lien against the ships for benefits which might possibly become due to them but remain unpaid. Such claims would still be enforcible by the seaman's maritime lien unless (as might be contended in the light of the peculiar provisions of the collective bargaining agreement) such claims, even when made for benefits by or for the seamen themselves, be deemed incapable of allocation to any particular ship upon which the seaman in question performed maritime service—a question we are not called upon to decide.

Libelant trustees argue that their claim for the contributions are solely for the benefit of the seamen and that, therefore, the trustees must be considered as standing in the shoes of the seamen —in effect—assignees or trustees of their claims.

It is well established that an assignee (and, we assume, a trustee) of a seaman may enforce the wage lien of the assignor or beneficiary. See *The President Arthur,* 25 F.2d 999 (S.D.N.Y. 1928). See also *United States v. Embassy,* 359 U.S. 29, 34 (1959).

However, in the pending case, as in *Embassy,* the contributions (as distinguished from the benefits themselves) are owed only to the trustees—not to the seamen.

The question presented in this case has previously been before the Courts. In *Brandon v. SS Denton,* 302 F.2d 404, 415-16 (5th

Cir. 1962) the Court had before it a situation identical with that now before this Court. Various seafaring unions and others contended that contributions owed by steamship companies under pension, welfare and vacation plan funds (substantially similar to those here involved) were the equivalent of "wages of the crew of the vessel" within the meaning of § 953 and, therefore, secured by a preferred maritime lien and entitled to priority over preferred ship mortgages. The Court, affirming the District Court (The *Denton,* 1960 A.M.C. 2264 (S.D. Texas 1960)[1] and the report of Commissioner Ross therein, held to the contrary.

Shortly after the District Court's 1960 decision in *The Denton, supra,* the District Court for the Eastern District of Texas, affirming a report of Commissioner Brookshire, (in an unreported decision), held that claims for contributions due the trustees for such *welfare and pension* plans did *not* come within the ambit of "wages of crew of the vessel" *but* that contributions payable to the trustees for *vacation* plans *were* entitled to the priority, ranking and status of seaman's lien for wages. Upon appeal the United States Court of Appeals, following its decision in *Brandon* affirmed the District Court's ruling with respect to claims due the welfare and pension plans, but reversed the lower court's ruling as to claims due the vacation plans. *Barnouw v. SS Ozark,* 304 F.2d 717 (5th Cir. 1962).

Subsequent to the District Court decisions in *The Denton* and *The Ozark,* the District Court for the District of Oregon reached the same conclusion as the Court in *The Denton, supra,* finding that the reasoning of Commissioner Ross in that case was sounder than Commissioner Brookshire's in *The Ozark. Irving Trust Co. v. The Golden Sail,* 197 F. Supp. 777 (D. Ore. 1961).

In *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29 (1959), the trustees of welfare funds (substantially similar to

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1. See also *The Kingston,* 1961 A.M.C. 1321 (S.D. Tex. 1961) reaching the same conclusion by the same Court.

those in our case) contended that contributions due the trust funds from a bankrupt employer were entitled to priority in payment under § 64(a)(2) of the Bankruptcy Act, as amended, 11 U.S.C. § 104(a)(2), as "wages . . . due to workmen." The Court held, however, that these contributions were not "wages . . . due to workmen" and denied them priority.

Libelant trustees greatly rely on *United States v. Carter*, 353 U.S. 210 (1957) in which the Court held that trustees of welfare trusts similar to those involved herein could recover against the surety for unpaid contributions due the trust funds from the contractor under the contractor's payment bond given pursuant to the Miller Act, 49 Stat. 793, 40. U.S.C. §§ 270a-d (1964).

However, the Court in *Embassy* has clearly distinguished Carter stating at 34-35:

> "Nor does the *Carter* case, *supra*, support the granting of a priority to these contributions. There we dealt with the Miller Act, which granted to every person furnishing labor or material the right to sue on the contractor's payment bond 'for the sum or sums justly due him.' The contractor defaulted and the trustees of a welfare fund similar to that involved here sued on the bond for recovery of contributions 'justly due.' Our opinion did not hold that contributions were part of 'wages . . . due to workmen.' In fact we pointed out that the trust agreement provided that the contributions 'shall not constitute or be deemed to be wages,' id., at 217. The Act having the broad protective purposes of securing all claims that are 'justly due', we held that the trustees might recover. In short, though the contributions were not wages, they were 'justly due' as a claim within 'the purposes of the Miller Act.' Under the Bankruptcy Act, however, not all claims 'justly due' have priority. They must be within a class, such as 'wages . . . due to workmen.' The claims here are not. If this class is to be so enlarged, it must be done by the Congress."

As the *Carter* and *Embassy* cases read together make clear, the test is not whether the claims for the contributions are made on

behalf of the employees, but whether the claims are of such a nature as to come within the protection of the "seaman's maritime claim" considered either in the traditional or statutory sense.

For the foregoing reasons this Court holds that the trustees' claims for the contributions are not entitled to the seaman's maritime lien or to preference as "wages of the crew of the vessel" within the meaning of 46 U.S.C. § 953.

This memorandum of decision shall constitute the Findings of Fact and Conclusions of Law as required by F. R. Civ. P. 52. Proctors representing the vessel interests shall prepare, serve on opposing counsel for approval as to form and lodge with the Court a final judgment for each of the five cases herein.

Dated: February 9th, 1967.

W. T. SWEIGERT
United States District Judge

The United States Court of Appeals
for the Ninth Circuit

JUDGMENT

[Entered in each of the five cases.]

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 16, 1968

ARTICLE III.

Sect. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controveries to which the United States shall be a party; to controversies between two or more States, between a state and citizens of another state,[7] between citizens of different States, between citizens of the same state claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

Labor Management Relations Act, 1947, § 302, as amended, 29 U.S.C. § 186

(a) It shall be unlawful for any employee or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the

exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * *

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire

to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

Ship Mortgage Act of 1920, § 30
46 U.S.C. § 953

(a) When used hereinafter in this chapter, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew if the vessel, for general average, and for salvage, including contract salvage. * * *

Internal Revenue Code, § 401
26 U.S.C. § 401

§ 401. Qualified pension, profit-sharing, and stock bonus plans.

(a) Requirements for qualification.

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404 (a) (3) (B) (relating to deduction for contributions to profit-sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaris;

Bankruptcy Act
11 U.S.C. § 104

§ 104 Debts which have priority [as among the unsecured creditors].

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, . . .; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceed-

ing, due to workmen, servants, clerks, or traveling, or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purpose of this clause, the term 'traveling or city salesman' shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; . . .; (4) taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof which are not released by a discharge in bankruptcy: *Provided, however,* That no priority over general unsecured claims shall pertain to taxes not included in the foregoing priority: *And provided further,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; * * *

165 English Reprint 1224

THE "MADONNA D'IDRA"

1 Dodson's English Admiralty Reports 37

[37] "MADONNA D'IDRA"—(Papaghica). [High Court of Admiralty] April 30, 1811.—Mariners wages take precedence of bottomry bonds—Subsistence part of wages—In cases of Greek navigation mariners to be subsisted till conveyed back to their own country.

This was the case of a Greek vessel, which brought a cargo of cotton, wool, and fruit, from Smyrna to London, where she arrived in February 1810, and discharged her lading. In the month of May, in the same year, a warrant was issued to arrest the ship, at the suit of Mr. Hansen, of London, the holder of two bottomry bonds. A memorial having been presented to the Earl of Liverpool, one of the Secretaries of State, by twenty-five of the mari-

ners, part of the crew of this ship, stating that they had been defrauded of their wages by the captain, and were left destitute of support, the King's Proctor received directions from the Secretary of State's office to take such steps as might be requisite to recover the wages due to the memorialists who were, in the meantime, furnished with the means of subsistence, and afterwards sent to their own country by His Majesty's Government. In consequence of the directions thus received, the King's Proctor intervened in the cause on behalf of the mariners. Mr. Hansen, the holder of the bonds, and consignee of the cargo, consented to pay the wages due to these men, but declined to defray the charges incurred for their subsistence. The ship was sold under a decree of the Court, and the proceeds brought into the registry, but the amount was not sufficient to satisfy the demands of the mariners and of the bond holder.

On behalf of the mariners it was contended, that they were entitled to priority of payment, and that the [38] money expended for their maintenance ought to be defrayed out of the proceeds of the ship in the first instance; and if that should prove insufficient, then out of the freight which was in the hands of Mr. Hansen.

On the other side it was submitted that the proceeds of the ship ought to be applied in payment of the bottomry bonds, in preference to all other demands, the wages having already been paid.

Judgment—Sir. W. Scott: This is one of those cases which are almost unavoidably involved in considerable mystery, and attended with great confusion and embarrassment upon the question of law arising on the facts, taking them to be ascertained; for it is a question of Greek navigation, which must depend in a great degree upon the customs and regulations of a foreign country, the exact state of which it is extremely difficult to ascertain. I may add, likewise, that it is a case in which the Court finds it by no means an easy task to obtain a correct and satisfactory statement of facts.

It appears that the ship sailed from Smyrna, at which place the master had taken up money on a bottomry bond; that in the course of her voyage she had put into Malta, where the master again procured money by means of another bond; and that she had since arrived in the port of London. What may be the original ground of dispute between the master and the crew *non constat.* No reason has been assigned for the quarrel, so that I am totally at a loss to discover what has led to it. The Court cannot find out which of the parties is the wrong-doer; whether there is a cause of

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forfeiture of wages on the part of the mariners, or [39] whether the misconduct of the master should entail any inconvenience on his owners.

It appears, that after the arrival of the ship in this country, Mr. Hansen, of this town, with perfect propriety, took out a warrant to arrest this ship, in order to obtain payment upon the bottomry bonds; and that a quarrel arose between the master and crew, which led to the probability that the ship might be left here in a state of distress. The ship has since been sold, under the directions of this Court, and the proceeds of the sale have been brought into the registry. In the meantime the sailors applied and proceeded for their wages in the courts of common law, in twenty-five separate actions; I do not say in an oppressive manner, for it was the only way in which they could there proceed: it is only in this Court that the mariners can combine their actions. The crew afterwards intervene in the suit carried on by Mr. Hansen in the Court of Admiralty, not exactly in the regular manner; but the Court does not expect it of such men, who are in an eminent degree *inopes consilii.* The Court would to such suitors give every relief in its power, by departing from forms, as far as is consistent with the justice due to others, especially where the Crown has intervened for the protection of the parties.

Mr. Hansen has, by his act in paying the wages schedulate, waived all objection to the informality of the proceedings; and the question now is, whether the money remaining in his hands shall be answerable for the subsistence of these mariners, or whether the Crown shall be left loaded with the support of them. Mr. Hansen has in his possession, and will retain, a larger sum than will be sufficient to satisfy any demands of his own: he will, at all events, suffer no derogation [40] of his own rights, and is concerned only on behalf of his employers, the holders of these bottomry bonds. The question is, whether he, as the agent of the bondholders, has a right to retain this money as against these mariners, or against the Crown, which stands in their place. Now, it must be taken as the universal law of this Court, that mariners' wages take precedence of bottomry bonds. These are sacred liens, and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted; and whoever enters into a contract, or advances money upon bottomry, must be presumed to do it with a full knowledge of the law upon this point. But, then, is the subsistence of these men to be considered as part of their wages? I think it is so to be considered; it is wages paid in another form, it is part of the compensation for their labour; and, according to the law of the country to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages. The parties must be subsisted till the return to their own country, unless some special reason is shewn to the contrary, such as desertion, or any kind of misconduct, which would work a forfeiture of wages. There is, indeed, no proof of any special agreement upon this point in the present case; but it is very material that such a covenant should be presumed to subsist between the parties, especially in a case like the present, of Greek navigation. The number of Greek vessels which arrive in this country is very small; and the

mariners, from the peculiarity of their language and habits, if discharged in England, could not, without extreme difficulty, find an opportunity of returning to their own [41] country. But the Court is not left solely to its own conjectures, as to what may be the established usage with respect to the subsistence or the dismissal of mariners employed in the navigation of Greek vessels. It is sworn by a person who states himself to have been for twenty years captain of an Ottoman vessel, and at present the consul-general of the Sublime Porte resident in Great Britain, that "the captain is bound by the customary regulations of Turkey to take his men back again in his vessel, or to find them conveyance in other vessels; and that in case of sale of the vessel in this country, the proceeds thereof are liable for the support of the crew, and to procure them the means of conveyance to their own country." This, I think, effectually distinguishes the present case from the American cases which were lately before the Court. The American seamen did not there attempt to establish their right, as due to them by the universal usage and custom of their country, or as forming part of the contract under which they sailed, but upon the ground of a statute lately introduced. As the demand was made upon a mere legislative act of that country, the Court declined to interfere, but it held there, that if the subject-matter in dispute between the parties had formed

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part of the contract, it would have upheld the demand. I shall, therefore, consider the proceeds as answerable for the subsistence as well as the wages of these mariners; but I shall not meddle with the freight which is in Mr. Hansen's hands.

PREME COURT. U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1968

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 941

JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. KAIMANA, her engines, etc., et al.,
Respondents.

JOHN A. CROSS, et al.,
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vs.
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S. S. ALASKA BEAR, her engines, etc., et al.,
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S. S. PACIFIC BEAR, her engines, etc., et al.,
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JOHN A. CROSS, et al.,
Petitioners,
vs.
S. S. COAST PROGRESS, her engines, etc., et al.,
Respondents.

Brief of Respondent Pacific Far East Line, Inc. (on behalf of *SS Kaimana, SS Lanakila, SS Pacific Bear* and *SS Alaska Bear*) in Opposition to Petition for a Writ of Certiorari

JOHN HAYS
260 California Street
San Francisco 94111
Attorney for said Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Brief of Respondent Pacific Far East Line, Inc. (on behalf of *SS Kaimana, SS Lanakila, SS Pacific Bear* and *SS Alaska Bear*) in Opposition to Petition for a Writ of Certiorari

Pacific Far East Line, Inc. (hereinafter respondent) as holder of preferred ship mortgages on *SS Kaimana, SS Lanakila* and

SS Pacific Bear, and as owner of *SS Alaska Bear* during the periods in which the debts which are sought in these actions to be charged as liens against the vessels accrued, opposes the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed in the above entitled cause.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals, not reported at the time the Petition was filed, is reported at 401 F. 2d 182.

STATUTES INVOLVED

With respect to the three cases in which respondent's status is that of holder of a preferred ship mortgage, Section 30 of the Ship Mortgage Act, 1920, 46 U.S.C. 953 (reproduced in the Appendix hereto) is directly involved in that only if the debts in question constitute "wages of the crew of the vessel" as this phrase appears therein can Petitioner prevail.[1]

QUESTIONS PRESENTED

1. Is the lien given by law to a seaman to secure payment of his wages enforceable by a non-seaman to collect non-wages?

2. Trusts having been established through collective bargaining to provide pension, vacation and welfare benefits to workers in the steamship industry, is the lien against a vessel which the law gives to a seaman to enforce collection of his earnings while serving thereon available to such a trust to enforce collection of amounts payable to the trust from an employer where (among other things):

(a) The payment of benefits to a worker is not dependent upon collection of the amounts due from his employer;

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1. With respect to the case in which respondent's status is that of vessel owner Petitioners also attempt to establish that the debts in question are or partake of the nature of wages due a seaman but no statutory language is involved.

(b) There is no identifiable connection between the benefits accruing to a worker and the amounts payable to the trust by his employer;

(c) Trust funds are used indiscriminately for the payment of benefits to persons who are not themselves entitled to a wage lien;

(d) All benefits due or to become due to all employees having claims against the trust, including those who served on the vessels in question, have been or will be paid in the ordinary course regardless of the outcome of these actions?

3. Will the intent of Congress in specifying in the Ship Mortgage Act, 1920 the rank which preferred ship mortgages shall enjoy in the hierarchy of maritime liens be subserved by permitting them to be outranked by debts of the kind here sought to be recovered?

4. If there is any doubt as to Question 3 should not resolution of the issue be left to the legislative process?

STATEMENT OF THE CASE

Former operators of the vessels involved failed to pay so-called "employer contributions" which they were obligated under collective bargaining agreements with the seagoing unions to pay to trusts established for the purpose of providing welfare, pension and vacation benefits to employees in the steamship industry. Being unable to collect such debts from these former operators because of their insolvency, the trusts (Petitioners herein) attempt by the instant actions to enforce collection by *in rem* proceedings against the vessels, alleging a right to assert a seaman's wage lien with the attendant priority over preferred ship mortgages afforded such liens by the Ship Mortgage Act of 1920.

Because the Petition fails to mention important characteristics of the trusts and of the debts sought to be collected, a brief recital of some of these characteristics is in order. Thus:

1. Contributions paid in by the employers are not credited to the accounts of particular workers but are intermingled and lose identity in the trust corpus.[2]

2. The amount of contribution accruing by virtue of the employment of a particular worker is not the amount that is eventually payable as a benefit to that worker—indeed, contributions may be payable by virtue of the employment of a worker who subsequently fails to qualify for benefits, as by not working a specified minimum period of time.[3]

3. The funds disbursed derive only in part from such contributions. A substantial portion of the trusts' income comes from extensive investment holdings, and some of the trusts provide for contributions from the employees as well as from the employers.[4]

4. Seamen are not the only recipients of the trusts' funds. Benefits are also paid to shoreside workers, such as union officials, personnel who administer the trusts, staffs of shore-based schools and recreational facilities, etc. Further, the expenses of administering the trusts (salaries, rentals, office equipment, legal and actuarial services, insurance and investment expenses, etc.) are all paid indiscriminately out of the trust corpus.[5]

5. The payment of benefits to seamen is guaranteed by Pacific Maritime Association,[6] which is an association of steamship companies operating from the Pacific Coast. Consistent therewith, the rate of contributions is recurringly increased (frequently retroactively) as required by actuarial predictions and increased benefits.[7]

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2. Record page 290, lines 8-13.

3. Rec. 289:11-14.

4. Rec. 277:20-25.

5. Rec. 288:24 to 289:10; Vessel Exhibit F 4:1 to 6:21; Vessel Exhibit G 3:27-4:6.

6. Transcript 31:2-3 and 19-21.

7. Rec. 284:11-16.

6. The trust documents explicitly provide that the individual beneficiaries have no right to collect the amounts due from the employers and no interest in the corpus of the trust.[8]

7. In eleven of the fifteen trusts the documents state:

> "[Employer] contributions to be paid into the fund shall not constitute or be deemed wages due to [employee]."[8]

8. It is stipulated that if any recovery is affected in the instant actions,

> "no part of the amount thereof will be distributed . . . to any individual beneficiary . . . but the amounts of such recovery will be added to the trust corpus."[9]

REASONS FOR DENYING THE WRIT

1. Previous denial of certiorari to consider the identical question.

Within the decade a series of cases was decided in the Fifth Circuit which Petitioners themselves do not attempt to distinguish and which denied seamen's wage lien status to delinquent employer contributions sought to be recovered by vacation, pension and welfare benefit trusts applicable to Gulf and Atlantic Coast Steamship operators. The first appellate decision was *Brandon v. S.S. Denton* (5 Cir. 1962) 302 F. 2d 404, followed in *Barnouw v. S.S. Ozark* (5 Cir. 1962) 304 F. 2d 717. Petition for certiorari in *Ozark* was denied (371 U.S. 923). Petitioner does not suggest what or why different considerations now apply.

2. The existing law is uniform.

Petitioner's precise contention has been rejected in the following decisions, additional to those of the courts below:

Brandon v. S.S. Denton (supra)

Barnouw v. S.S. Ozark (supra)

The Kingston (S.D. Texas) 1961 A.M.C. 1321 (Not reported in the Reporter System)

Irving Trust Company v. The Steamscrew Golden Sail, (D. Or. 1961) 197 F. Supp. 777

There are no decisions to the contrary.

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8. Vessel's Exhibit 2.
9. Rec. 290:8-13.

3. Only if the decision below was reversed would the question have importance.

(a) Under Existing Law:

No segment of society is descernibly affected by the result reached by the Court below. The workers will receive all benefits accruing from their labors because the integrity of the trusts is guaranteed by the entire industry. It might seem that those who provide this guarantee—viz., the employers as a group—would benefit if a delinquency of one of their members is recovered, and indeed the District Court below noted that the instant suits, rather than being for the benefit of the beneficiaries are "more for the protection of the other steamship companies against increase of their rate of compensation by reason of default of one or some of them." (Appendix to Petition, p. 9) However, there is no suggestion or indication in the record that the delinquencies here involved were a factor taken into account in establishing subsequent changes in employer contribution rates, and in view of the enormous sums passing into the trusts every year,[10] it is implausible that such was the case. Funds are regularly expended for purposes other than the payment of benefits[11] and it is more probable that a recovery in this case would merely increase the opportunity for extra-curricular activities. Nor, as a practical matter, is it likely that the situation will ever be otherwise, either with these particular trusts or any others.[12]

(b) If the Law Were Otherwise:

On the other hand, if Petitioner's position were sustained, serious consequences, adversely affecting important segments of so-

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10. $13,480,156.46 in 1960 (Vessel's Exhibit F 7:6) and many times that today.

11. In the case of one of the trusts the entire amount sued for is exceeded by the *annual* contribution to a school for seamanship.

12. It is to be more borne in mind that the trusts can at any time prevent the accrual of further delinquencies by refusing to furnish seaman to the errant operator.

ciety, would ensue. Banks and other mortgagees are not the only class concerned with the security value of vessels. Repairmen, suppliers, towers and others rely daily on the credit of a vessel available to them through the remedy of a proceeding *in rem* to enforce repairmen's and supplymen's liens. Buyers are also concerned with the possible existence of undisclosed liens. It has repeatedly been recognized that:

> "The maritime lien is a secret one. It may operate to the prejudice of prior mortgages or of purchasers without notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference." (*Piedmont & Georges Creek Coal Company v. Seaboard Fisheries Company,* 254 U.S. 1, 12 (1920). See also, *The Yankee Blade,* 19 How 82, 89 (1856); *Osaka Shosen Kaisha v. Pacific Export Lumber Company,* 260 U.S. 490, 499 (1923); *Plamals v. S.S. "Pinar Del Rio,"* etc., 277 U.S. 151, 156 (1928).)

In fact, since the particular lien claimed happens to be the one enjoying the highest priority of all, debts of the kind sought to be recovered here will, if Petitioner's position is sustained, outrank not only preferred ship mortgages and supply liens but other high priority liens, such as for general average, salvage, and taxes and will even compete for the mythical "last plank" with the wage earners themselves. Such a result would seriously disrupt accepted financial patterns.

4. The question is in any event properly one for legislative resolution.

The purpose of the Ship Mortgage Act of 1920 was to make ship mortgages desirable investments. See *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 39 (1934); *Gilmore & Black, The Law of Admiralty,* § 9-48. The "preferred ship mortgage" is thus a creature of Congress. If debts of the kind here involved are given the lien status enjoyed by a seamen's wage claim, they will outrank this Congressionally-created and Congressionally-favored

security interest. The wisdom of such a change should be evaluated by the legislative process rather than determined in *ad hoc* litigation between private disputants.

5. A result contrary to that below would be inconsistent with other decisions of this Court.

In *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) this Court held that employer contributions to an employee welfare fund of the type involved here are not "wages" for priority purposes under the Bankruptcy Act. *Joint Industry Board of the Electrical Industry, et al., v. United States,* 391 U.S. 224 (1967) found the same to be true of employer payments to an employees' annuity fund, even where the payments were credited to the account of each individual employee rather than (as in the case below) being intermingled and losing identity in a general fund.

It is not suggested that decisions on questions of bankruptcy law are necessarily determinative of analogous questions arising in the admiralty field. Nevertheless attributing wage lien status to debts of the kind here involved would be difficult to reconcile with *Embassy* and *a fortiori* with *Joint Industry Board of the Electrical Industry.*

6. Rule 23(4) of the Supreme Court Rules is applicable to the Petition.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition be denied.

Respectfully submitted,

JOHN HAYS
DORR, COOPER & HAYS

(Appendix Follows)

Appendix

Ship Mortgage Act, 1920 § 30

46 U.S.C. § 953:

953. Preferred maritime lien; priorities; other liens

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording an indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of cost, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of such a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in the amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, in the court. June 5, 1920, c. 250, § 30, Subsec. M, 41 Stat. 1004.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 941

JOHN A. CROSS, ET AL., PETITIONERS

v.

S. S. KAIMANA, HER ENGINES, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue in this case is whether employee benefit trusts hold "preferred maritime liens" for unpaid employer contributions and thus are entitled to priority over mortgage liens under Section 30 of the Ship Mortgage Act, 46 U.S.C. 953. Under the statute, such priority exists only if these contributions constitute "wages of the crew of the vessel." [1]

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[1] Section 30 provides in relevant part:

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means * * * (2) a lien for

Under a collective bargaining agreement between various maritime unions and the Pacific Maritime Association, shipowners are obligated to contribute to certain trusts established for the purpose of providing welfare, pension and vacation benefits to seamen and specified categories of shoreside employees. The petitioners are the trustees of those trusts. Respondents, including the United States, hold preferred ship mortgages on the vessel against which petitioners attempt to assert the priority of a preferred maritime lien for the unpaid contributions.

Both courts below held that the employers' obligations to the trusts did not give rise to liens entitled to priority under the Ship Mortgage Act. This determination is correct and follows the uniformly accepted doctrine that contributions to pension, welfare, and vacation trust funds are not "wages of the crew of the vessel" for the purposes of Section 30. *Barnouw* v. *S. S. Ozark*, 304 F. 2d 717 (C.A. 5), certiorari denied *sub nom. Socony Mobil Oil Co., Inc.* v. *Wall Street Traders, Inc.*, 371 U.S. 923; *Brandon* v. *S. S.*

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damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, *for wages of the crew of the vessel,* for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, * * * the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. [Emphasis added.]

Denton, 302 F. 2d 404 (C.A. 5); *Irving Trust Co.* v. *The Golden Sail*, 197 F. Supp. 777 (D. Ore.); *The Kingston*, 1961 A.M.C. 1321 (S.D. Tex.). Such contributions are owed to the trustees, not to any seaman; a particular seaman has no direct interest in or right to the contributions made on his behalf, and he receives benefits even if his employer fails to contribute what is owed.[2]

This Court has held, most recently just last Term, that similar employer contributions to a union trust fund are not "wages * * * due to workmen" entitled to priority under Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C. 104(a)(2). *United States* v. *Embassy Restaurant*, 359 U.S. 29 (pension, welfare, and vacation trusts); *Joint Industry Board of the Electrical Industry, et al.* v. *United States*, 391 U.S. 224 (employee annuity trust). There is no good reason why the virtually identical provisions of the two Acts having analogous purposes should be interpreted differently.

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[2] As the district court pointed out (Pet. App. 7-8), the amount of benefits received by a seaman from the trust is not necessarily the same as the employer contributions made on his account.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

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